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IN THE

Supreme Court of the United States

October Term, 19 .....

No. 74-696

SOCIETE DE CONSTRUCTION MECANIQUES DU BUGEY and TICHAUER ET CIE,

Petitioners,

VS.

BELL EQUIPMENT CORPORATION, a corporation, JAMES A. GORSO, JACK CHICONELLA, CLYDE A. TEVIS, HARRY J. PHILLIPS, RICHARD E. McKENNA, AMEDIO VITALE, and THE MARLEY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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SOCIETE DE CONSTRUCTION MECANIQUES DU BUCEY and TICHAUER ET CIE.

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Respondents.

PETITION FOR WRIT OF CERTIORARI

To: The United States Court of Appeals for the Third Circuit.

Petitioners pray that a Writ of Certiorari issued to review the Order of the United States Court of Appeals for the Third Circuit entered in the above captioned cases on September 5, 1974.

Reference to Opinions in the Courts Below

The Opinion of Judge Knox of the United States District Court for the Western District of Pennsylvania denying petitioner's Motion to Dismiss appears in Appendix A, p. 14 and is reported at 330 F. Supp. 834 (W.D. Pa., 1971). The Opinion of the Court of Appeals for the Third Circuit reversing Judge Knox's decision is found in Appendix A at p. 20 and is reported at 476 F.2d 1216 (1973). The Opinion and Order of Judge Miller of the District Court refusing a renewed Motion to Dismiss appears in Appendix A at p. 38 and is reported at 376 F. Supp. 1027 (W.D. Pa. 1974) and Judge Miller's subsequent Order certifying the case for appeal to the Third Circuit appears in Appendix A at p. 52. Order is unreported. The Order of the Court of Appeals for the Third Circuit appears in Appendix A at p. 54.

Jurisdiction

The Order of the Court of Appeals for the Third Circuit was dated September 5, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1651 and 28 U.S.C. § 1254(1).

Questions Presented

I. Whether the Court of Appeals erred in refusing to hear an appeal from an order of the District Court overruling a motion to dismiss for lack of personal jurisdiction under the Pennsylvania amended "Long Arm" Statute where a prior motion to dismiss under the pre-amendment "Long Arm" Statute was overruled, the question certified for appeal by the District Court and the Court of Appeals accepted the appeal and reversed the judgment of the District Court?

II. Whether the Pennsylvania "Long Arm" Statute, Act of November 15, 1972, P.L.—, No. 271, 42 P.S. § 8301 *et seq.*, specifically § 8309 providing that the "shipping of merchandise directly or indirectly into or through this Commonwealth" shall constitute "doing business" and thereby subjecting a foreign corporation to the *in personam* jurisdiction of the Commonwealth of Pennsylvania violative of the Due Process Clause of the Fourteenth Amendment?

III. Whether the Pennsylvania "Long Arm" Statute is violative of the Due Process Requirement of the Fourteenth Amendment to the Constitution if applied to the French Companies in this case to subject them to the personal jurisdiction of the Commonwealth of Pennsylvania?

IV. Whether the French Companies can be subjected to *in personam* jurisdiction of the Commonwealth of Pennsylvania pursuant to the terms of the Pennsylvania "Long Arm" Statute enacted November 15, 1972, effective February 15, 1973 where the third party complaints against the French Companies were initially filed in 1970 and where service of process attempted under the Pennsylvania "Long Arm" Statute in effect prior to February 15, 1973 was held to be ineffective by the Court of Appeals for the Third Circuit?

V. Whether *in personam* jurisdiction over the French Companies may properly be obtained by service of process in accordance with a new "Long Arm" Statute following a final judgment of the Court of Appeals for the Third Circuit that attempted service of process under the old "Long Arm" Statute was ineffective?

Statutes Involved

The Fourteenth Amendment to the Constitution.

Pennsylvania Act of November 15, 1972, P.L.—, No. 271 § 8301 *et seq.*, 42 P.S. § 8301 *et seq.* Act of July 20, 1968, P.L. 216 § 54c, 15 P.S. § 2011c, repealed, 1972. The statutory provisions are set forth in Appendix B.

Statement of the Case

These civil actions were commenced to recover damages for personal injuries and property damage sustained at a construction project near Huff, Pennsylvania and allegedly caused as a result of a defective tower crane. The crane involved was manufactured in France by the Societe de Construction Mecaniques du Bugey (hereinafter Societe), a French Corporation. The crane was sold by Societe to Tichauer et Cie (hereinafter Tichauer), also a French Corporation. Tichauer then sold the crane F.O.B. France to Bell Equipment Corporation (hereinafter Bell), a New York Corporation which had the exclusive rights for sale of the crane in the United States of America. The crane in turn was sold by Bell to the Marley Company (hereinafter Marley) and delivered to Marley in Ohio. After being used on other construction projects the crane was brought to the job site in Pennsylvania by Marley.

Plaintiffs instituted their actions against Bell which joined Marley, Societe and Tichauer as third party defendants. Neither Societe nor Tichauer were registered to do business in the Commonwealth of Pennsylvania. Neither had a place of business in Pennsylvania nor had any employees in Pennsylvania. Bell petitioned the District Court for an Order permitting service of process to be made on

Tichauer and Societe by serving the Secretary of the Commonwealth of Pennsylvania in accordance with the Pennsylvania Long Arm Statute in effect at that time, Act of July 20, 1968, P.L. No. 216, § 54, 15 P.S. § 2011e, Appendix B, p. 68.

Motions to Dismiss and to Quash the Service of Process upon the Secretary of the Commonwealth were then filed on behalf of Societe and Tichauer averring that neither of the French Companies were doing business in the Commonwealth of Pennsylvania nor did they have any contact or presence within Pennsylvania and were not, therefore, subject to the *in personam* jurisdiction of the Courts of Pennsylvania.

The tower crane involved in this accident was one of only two cranes manufactured and sold by the French Companies to Bell and the only crane brought into the Commonwealth of Pennsylvania. Two shipments for orders of spare parts were made by Tichauer into Pennsylvania at the request of Marley. The first order was placed, however, before the crane was brought to Pennsylvania.

Judge Knox of the District Court denied the Motion to Dismiss, holding that the French Companies were doing business in Pennsylvania. Appendix A. p. 14. Judge Knox certified the jurisdictional issue as appropriate for an interlocutory appeal and on August 24, 1971 an application was made to the Court of Appeals for the Third Circuit to hear the interlocutory appeal. On September 17, 1971 the Court of Appeals granted leave to appeal. On March 2, 1973, amended April 5, 1973, the Court of Appeals entered an Opinion and Order reversing the Order of the District Court at 476 F.2d 1216, Appendix A. p. 21.

On November 15, 1972 during the pendency of the appeal in the Court of Appeals, the Pennsylvania Legislature enacted a new Long Arm Statute, Act of November 15, 1972, P.L. No. 271, 42 P.S. Section 8301 *et seq.*[1] The Court of Appeals in its Opinion vacating Judge Knox's Order noted the passage of the new Act but refrained from commenting on the susceptibility of the French Companies to *in personam* jurisdiction in Pennsylvania under the new Act and also refrained from commenting on the retroactivity of the 1972 Act.

Upon remand counsel for Bell obtained leave from the District Court to re-serve the French Companies under the terms of the new Long Arm Statute. Service having been made under the new Act, your Petitioners again moved to dismiss the Complaint and quash service of process on the ground that your Petitioners were not doing business in Pennsylvania, or in the alternative, if it should be determined that the French Companies were doing business in Pennsylvania then the Act was unconstitutional. Judge Miller of the District Court denied the Motion to Dismiss but the issue was again certified as appropriate for an interlocutory appeal, Appendix A, p. 52. On September 5, 1974 the Court of Appeals declined to hear the appeal and your Petitioners have filed this Petition for Certiorari from the Order of the Court of Appeals dated September 5, 1974.

Jurisdiction in District Court

Jurisdiction in the District Court is based upon diversity of citizenship and the amount in controversy being in excess of $10,000.00 exclusive of interest and costs.

[1] The new Act set forth the same bases for doing business as its predecessor but the new Act provides that it is intended to extend to the constitutionally permissible limit. 42 P.S. § 8309(b), Appendix B, p. 64.

Reasons Why Writ of Certiorari Should be Granted

1. The application of the Pennsylvania Long Arm Statute to the French Companies in this case raises substantial questions as to the constitutionally permissible limits of a state's exercise of *in personam* jurisdiction over a foreign corporation in a tort action arising from injuries allegedly sustained as a result of a defective product.

2. Under the facts of this case the subjection of the French Companies to *in personam* jurisdiction in Pennsylvania offends traditional notions of fair play and substantial justice in that the French Companies lack that substantial contact with the Commonwealth of Pennsylvania which is required under the teachings of this Court in *International Shoe Co. vs. State of Washington*, 326 U.S. 310 (1945). The crane involved in this case was manufactured and sold by the French Companies in France to Bell Equipment Corporation, a New York Corporation. Subsequently, the crane was shipped from France to the Marley Company in Ohio by Bell. The Marley Company subsequently brought the crane into Pennsylvania. Other than the subsequent shipment of small quantities of replacement parts the French Companies had absolutely no contact with the Commonwealth of Pennsylvania and certainly derived no benefit from the fact that the crane was used in Pennsylvania.

3. The advent of the concept of strict liability in tort, adopted by an ever increasing number of states, has tremendously expanded the scope of products liability litigation involving foreign corporations. In resolving challenges to *in personam* jurisdiction the Appellate Courts of numerous states and the Circuit Courts of Appeal have found it necessary to rely on the decisions of this Court in *International Shoe Co. vs. Washington, supra*, and ampli-

fied somewhat in *Hanson vs. Denckla*, 357 U.S. 235 (1958) for guidance. Neither the *International Shoe Co.* case nor *Hanson vs. Denckla* involved the attempted extension of *in personam* jurisdiction to foreign corporations in tort or products liability cases. There is a need for more specific guidelines in determining the constitutionally permissible limits of *in personam* jurisdiction. See *Benjamin vs. West Load Building Corp.*, 472 F.2d 725 (5 Cir., 1973). A current enunciation by the Court of the standards to be applied in determining the constitutional limits of *in personam* jurisdiction would serve to promote uniformity among the state and Circuit Courts attempting to define the constitutional limits of personal jurisdiction.

4. Under the "stream of commerce" theory adopted by various Courts any manufacturer regardless of size, which sells its product can be compelled to defend the product in any jurisdiction on a mere allegation that the product is defective and caused injury within the forum without regard to the circuity of the route by which the product found its way into the forum.

Cases illustrative of the stream of commerce theory are: *Gray vs. American Radiator*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1960), in which a valve manufactured in Ohio was incorporated into a radiator in Pennsylvania and the radiator allegedly exploded in Illinois causing injury to the plaintiff, an Illinois resident; the Court held that there was sufficient contact to permit the exercise of Illinois Personal Jurisdiction over the valve manufacturer; *Phillips vs. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732 (1966), in which the Court assumed that the only contact which the defendant, a manufacturer of an allegedly defective plate, had with the State of Arizona was the presence of the alleged single defective plate in Arizona and held that the contact was sufficient to permit the exercise of

personal jurisdiction; *Duple Motor Bodies, Ltd. vs. Hollingsworth,* 417 F.2d 231 (9 Cir. 1969), in which an English manufacturer of a bus chassis which was incorporated into a bus manufactured in England was held to be amenable to the personal jurisdiction of Hawaii and required to defend a claim in Hawaii based upon an alleged defect in the bus chassis; *Benn vs. Linden Crane,* 326 F. Supp. 995 (E.D. Pa. 1970) in which it was held that a Swedish manufacturer of cranes was amenable to personal jurisdiction in Pennsylvania where one of the defendants' cranes allegedly caused injury in Pennsylvania and defendant admitted that it knew some of its cranes would ultimately be brought into Pennsylvania.

If personal jurisdiction over a foreign corporation is proper for the sole reason that a product manufactured by it is brought into the forum, then the protection of jurisdictional due process afforded a foreign corporation under *International Shoe Co. vs. Washington, supra,* is without meaning. For example, in *Phillips vs. Anchor Hocking Glass Corp., supra,* the Arizona Court noted that *Hanson vs. Denckla, supra,* required that the defendant undertake some purposeful activity within the forum in order to be subjected to the forum's personal jurisdiction but the Arizona Court disregarded the language in *Hanson vs. Denckla,* concluding that the purposeful requirement was incompatible with the need to enable the residents of a forum to proceed in the forum state on claims against manufacturers of allegedly defective products.

The stream of commerce theory represents a complete disregard of one of the factors which this Court deemed relevant to a determination of whether the exercise of *in personam* jurisdiction over a foreign corporation offends traditional notions of fair play, 326 U.S. at 316-319:

"Historically the jurisdiction of Courts to render judgment *in personam* is grounded on their *de facto* power over the defendant's person. Hence, his presence within the territorial jurisdiction of a Court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer vs. Neff*, 95 U.S. 714, 733, 24 L. Ed. 565. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within that territory of the forum, *he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'*. (Citations omitted.)

. . .

Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. *An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection.* (Citation omitted.) Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there . . . (Citations omitted.) To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities have been thought to lay too great and unreasonable a burden on the corporation to comport with due process." (Emphasis in original.)

Hanson vs. Denckla, 357 U.S. 235 (1958) instructs that the activity must be "purposeful" in order to subject the foreign corporation to *in personam* jurisdiction of the forum, 357 U.S. at 253:

> "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, *but it is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus, invoking the benefits and protections of its laws. International Shoe Co. vs. State of Washington*, 326 U. S. 310, 66 S. Ct. 154, 159, 90 L. Ed. 95." (Emphasis supplied.)

Mere placement of an article into the stream of commerce cannot fairly be said to be a purposeful activity in a forum state where the product is sold, resold and resold again before finally being transported into the forum state.

5. This case presents an opportunity for this Honorable Court to consider and refine the principles set forth in *International Shoe* nearly thirty years ago. A consideration and refinement is necessitated by the volume of products liability litigation in which manufacturers of all types and sizes are subjected to the same generalized standard in determining whether they are conducting business in the forum state.

6. The subjection of a foreign corporation to personal jurisdiction under the State Long Arm Statute in an international setting presents issues which do not exist in cases involving foreign corporations domiciled in other states, which issues have not heretofore been addressed by this Court. For example, in an international transaction a factor which should be considered in estimating the inconveniences to the international foreign corporation in defending an action in the forum must surely be the existence of a national distributor of the product such as Bell Equipment Corporation in this case. Where, as here, Bell has purchased a limited number of cranes in France, imported

them to the United States and resold the crane in the United States, why should Bell not bear the responsibility of defending claims of product failure in the United States. In addition, the exercise of State Personal Jurisdiction over an international foreign corporation may involve an undue interference by the State in the foreign relations of the United States; the possibility of such an intrusion should at least be a factor to be considered in such cases. See *Duple Motor Bodies, Ltd. vs. Hollingsworth*, 417 F.2d 231 (9 Cir. 1969), dissenting opinion by Judge Ely, 417 F.2d at 238:

> "Turning to consideration of the 'fairness' factor, I truely think it shocking that Duple should be required to travel half way around the world to participate in the defense of a suit in which there are several other defendants directly privy to the transaction and who are amenable to the jurisdiction of the district Court. Their involvement in the transaction extended far beyond the remote and as I see it, less than 'minimal' participation of Duple. The principal justification for the modern extension of a state's *in personam* jurisdiction over non-resident defendants has centered around the expanded means of interstate commerce that have now evolved.
>
> . . .
>
> I am disturbed over another consequence of the majority's result. Upholding Hawaii's jurisdiction over Duple in a case such as this will necessarily have an adverse effect on our Country's international relations, a field exclusively within the providence of the legislative and executive branches of our government. See *Zschernig vs. Miller*, 389 U.S. 429, 88 S. Ct. 664, 19 L. Ed. 2d 683 (1968). If alien corporations are to be made subject to the jurisdiction of American Courts on the basis of an isolated transaction, then that decision should be made as a matter of national policy, particularly in light of possible reprisals, political, economic, or legal."

Conclusion

For all of the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

MEYER, DARRAGH, BUCKLER,
BEBENEK & ECK,

By KIM DARRAGH, ESQUIRE,
Attorney for Societe de Construction Mecaniques du Bugey and Tichauer et Cie.

APPENDIX A

Opinion of Judge Knox

JAMES A. GORSO,

v.

BELL EQUIPMENT CORPORATION,

v.

THE MARLEY COMPANY *et al.*

Civ. A. Nos. 68-1356, 69-20, 69-21, 69-23, 70-1177.
United States District Court, W. D. Pennsylvania.
Aug. 18, 1971.

Plaintiff brought action to recover damages for injury sustained while working in Pennsylvania and allegedly caused by defective crane. The seller of the crane attempted to join intermediate seller and manufacturer, both French corporations, as third-party defendants. The French corporations moved to dismiss the third-party complaint for lack of personal jurisdiction. The District Court, Knox, J., held that where manufacturer sold the crane to second French corporation which in turn sold it to corporation which had exclusive distribution rights in United States, the French corporations had indirectly shipped the crane into Pennsylvania and thus were "doing business" there within Pennsylvania long-arm statute despite allegations the crane in question was the only one ever sold to the American distributor and that neither of the French corporations knew that the crane would be used in Pennsylvania.

Motion denied.

CORPORATIONS—642(1)

Where French manufacturer sold crane to second French corporation which in turn sold the crane f. o. b. France to corporation which had exclusive distribution rights in the United States, French corporations had indirectly shipped the crane to Pennsylvania, where plaintiff was injured allegedly as result of defects in the crane, and were "doing business" in Pennsylvania within its long-arm statute, and extension of jurisdiction over the French corporations would not offend fair play and equal justice, despite allegations that the crane in question was the only one ever sold to the American distributor and that neither of the French corporations knew that the crane would be used in Pennsylvania. 15 P.S.Pa. § 2011, subd. C.

See publication Words and Phrases for other judicial constructions and definitions.

Stokes, Lurie & Tracy, Pittsburgh, Pa., for plaintiff.

Lancaster, Mentzer, Coyne & Duffy, Weis & Weis, Meyer, Darragh, Buckler, Bebenek & Eck, Pittsburgh, Pa., for defendant.

OPINION AND ORDER DENYING MOTION TO DISMISS

KNOX, District Judge.

In this civil action the plaintiff seeks to recover damages for injuries sustained on October 6, 1968, while working at a construction project near Huff, Pennsylvania. It is alleged that the injuries were caused by a defective crane, which crane was manufactured in France by Societe de Construtiones Mecaniques du Bugey (Societe) and sold

F. O. B. France by Tichauer et cie (Tichauer) to Bell Equipment Corporation (Bell), which in turn sold the crane to The Marley Company (Marley).

The complaints filed at the above numbers have alleged that the crane was defective when sold to Marley. Bell has alleged that if the crane was defective, it was defective when manufactured by Societe and sold to Bell by Tichauer. Bell has attempted to join the seller Tichauer and the manufacturer Societe as third-party defendants. Both Tichauer and Societe have moved to dismiss the third-party complaint for lack of personal jurisdiction. Tichauer and Societe are French corporations having no offices, servants or assets, tangible or intangible in the United States. Third-party defendants assert that although Bell had the exclusive rights for distribution of the crane in the United States, the crane in question is the only one ever sold to Bell. It is further asserted that at the time the crane was manufactured by Societe and sold to Tichauer and then resold by Tichauer to Bell, neither of the French companies knew that the crane would be used in Pennsylvania.

On the facts of this case, the sole issue requiring decision by this court is whether the third-party defendants are or ever were "doing business" in Pennsylvania. Jurisdiction in the instant case is dependent on an interpretation of the Pennsylvania long arm statute applicable to foreign corporations, 15 P.S. § 2011(C) (1971 Supp.)[1]

[1] "For the purposes of determining jurisdictions of courts within this Commonwealth, the doing by any corporation in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object, or doing a

(Footnote continued on following page)

Appendix A—Opinion of Judge Knox

While no controlling case has been found which interprets the specific language of the 1968 Amendment to the long arms statute, clearly the language indicates an intention to extend the court's jurisdiction to the Constitutional limits as announced in International Shoe Company v. State of Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945). Having by contract given Bell the exclusive sales rights in the Territory of the United States and Puerto Rico, surely these French corporations ought not to feign surprise when one of their cranes, allegedly defective, reaches Pennsylvania and causes injury to its citizens. Such an eventuality must have been reasonably foreseeable in this age of advanced marketing. This court, instructed by the recent well-reasoned opinion of Judge VanArtsdalen in the Eastern District,[2] finds the facts of this case sufficient to establish that the French corporations, third-party defendants herein, made an "indirect shipment" into Pennsylvania and were "doing business" within the purview of the Pennsylvania Statute. The court, in Benn v. Linden Crane Co., expressed itself as follows:

> "A shipment of goods indicates a conscious placement of those goods into the stream of commerce. Obviously, if a manufacturer sells his products directly to the ultimate consumer, the movement of those goods

(Footnote continued from preceding page)
single act in this Commonwealth for such purpose, with the intention of thereby initiating a series of such acts, shall constitute 'doing business'. *For the purposes of this subsection the shipping of merchandise directly or indirectly into or through this Commonwealth shall be considered the doing of such an act in this Commonwealth.*" (emphasis added) As amended 1968, July 20, P.L. ____, No. 216, § 51, effective in 30 days.

[2] Benn v. Linden Crane Co., 326 F.Supp. 995 (U.S.E.D.Pa., 1971).

> pursuant to the sale would be a direct shipment. However, economic and business reasons dictate that goods will pass through any number of people in a distributive chain before they reach the ultimate consumer. It is the movement of goods through this distributive chain that in this case constitutes an 'indirect shipment'. Linden-Alimak manufactured and sold a crane f. o. b. Swedish port to a purchaser (also a co-defendant) that had exclusive control over shipment of the manufacturer's products to the United States. Linden-Alimak had reason to know that the crane would be resold for ultimate use and operation in the United States. The crane, while being operated in Pennsylvania, allegedly injured plaintiff by reason of a malfunction claimed to be caused by the negligence of the manufacturer and others. Under these facts, I find that Linden-Alimak made an 'indirect shipment of goods' into Pennsylvania and was 'doing business' within the definition of the Pennsylvania statute."

In the recent case of Scafati v. Bayerische Motoren Werke AG, 53 F.R.D. 256 (U.S.W.D.Pa.1971), a German automobile manufacturer was found by Judge McCune of this court to be properly within our jurisdiction. In that case, the plaintiff's decedent, driving one of defendant's manufacturer's automobiles, was killed in an automobile accident on March 22, 1969. The complaint averred that death was caused by defective auto design. The defendant, asserting it had no office, agent or employee in the United States, moved for dismissal. Finding that B.M.W. had indirectly shipped goods into Pennsylvania and was doing business in this state for the purposes of 15 P.S. § 2011(C), the court denied the motion to dismiss.

The Pennsylvania legislature has a legitimate interest in the safety of its citizens and in proving them with a local

forum for enforcing their rights as long as such legislative protection does not offend one's sense of fair play and equal justice. In the present case, the exclusive sales contract given Bell surely contemplates the ultimate arrival of the French corporation's cranes within Pennsylvania. While plaintiffs do have a remedy against the original defendant (Bell), in the spirit of equal justice Bell must be given the opportunity to assert indemnification against these French corporations which placed an allegedly dangerous and defective product into the channels of commerce.

For these reasons, the Motion to Dismiss will be denied.

Opinion of the Court of Appeals

JAMES A. GORSO,

v.

BELL EQUIPMENT CORPORATION,
a corporation,

v.

The MARLEY COMPANY, a corporation and Societe de Construction Mecaniques du Bugey and Tichauer et Cie.

Appeal of SOCIETE DE CONSTRUCTION MECANIQUES DU BUGEY and Tichauer et Cie,
in No. 71-2035, (five cases).

JACK CHICONELLA,

v.

BELL EQUIPMENT CORPORATION,
a corporation,

v.

The MARLEY COMPANY, a corporation and Societe de Construction Mecaniques du Bugey and Tichauer et Cie.

CLYDE A. TEVIS,

v.

BELL EQUIPMENT CORPORATION,
a corporation,

v.

The MARLEY COMPANY, a corporation and Societe de Construction Mecaniques du Bugey and Tichauer et Cie.

HARRY J. PHILLIPS,

v.

BELL EQUIPMENT CORPORATION,
a corporation,

v.

The MARLEY COMPANY, a corporation and Societe de Construction Mecaniques du Bugey and Tichauer et Cie.

AMEDIO VITALE,

v.

BELL EQUIPMENT CORPORATION,
a corporation,

v.

The MARLEY COMPANY, a corporation and Societe de Construction Mecaniques du Bugey and Tichauer et Cie.

Nos. 71-2035 to 71-2039.

United States Court of Appeals,
Third Circuit.

Argued Dec. 14, 1972.

Decided March 2, 1973.

As Amended April 5, 1973.

In a personal injury suit, the United States District Court for the Western District of Pennsylvania, Knox, J., 330 F.Supp. 834, denied a motion to dismiss two impleaded defendants for lack of personal jurisdiction. The question was certified for interlocutory appeal and the appeal was accepted. The Court of Appeals, Seitz, Chief Judge,

held that where the French manufacturer of the crane had terminated its relationship with its national sales agent, which had an office in Pennsylvania, before the crane collapsed and no new national agent was appointed and there had been no prior sale within the Commonwealth the manufacturer was not "doing business" in Pennsylvania, within the Pennylvania long-arm statute, through such agency, and that the manufacturer and a French company acting as its exclusive world sales agent were not "doing business" in Pennsylvania though the crane brought into Pennsylvania by the purchaser collapsed in Pennsylvania and though spare parts had been sent into Pennsylvania by such agent; such alleged bases of jurisdiction were mere sporadic occurrences.

Order reversed and case remanded.

1. Courts—359(2)

Pennsylvania law applied where jurisdiction in federal district court in Pennsylvania was predicated on diversity of citizenship.

2. Courts—12(2)

In enacting 1968 amendment of Pennsylvania long-arm statute, legislature was motivated at least in part by desire to provide local forum for suits against foreign manufacturers of defective products. 15 P.S.Pa. § 2011.

3. Courts—12(2)

Pennsylvania long-arm statute as amended in 1968 does not yet reach constitutionally permissible limit. 15 P.S.Pa. § 2011, subds. B, C; U.S.C.A.Const. Amend. 14.

4. Corporations—642(4½)

Where French manufacturer of crane had terminated its relationship with national sales agent, which had office in Pennsylvania, before crane collapsed and no new national agent was appointed and there had been no prior sale within the Commonwealth, manufacturer was not "doing business" in Pennsylvania, within Pennsylvania long-arm statute, through such agency. 15 P.S.Pa. § 2011, subds. B, C.

See publication Words and Phrases for other judicial constructions and definitions.

5. Corporations—642(6)

French manufacturer of crane and French company acting as its exclusive world sales agent were not "doing business" in Pennsylvania within Pennsylvania long-arm statute though crane brought into Pennsylvania by purchaser collapsed in Pennsylvania and though spare parts had been sent into Pennsylvania by such agent; such alleged bases of jurisdiction were mere sporadic occurrences. 15 P.S.Pa. § 2011, subds. B, C; U.S.C.A.Const. Amend. 14.

Kim Darragh and Raymond H. Conaway, of Meyer, Darragh, Buckler, Bebenek & Eck, Pittsburgh, Pa., for appellant.

James E. Coyne, Lancaster, Mentzer, Coyne & Duffy, Pittsburgh, Pa., for appellee.

Before SEITZ, Chief Judge, and ALDISERT and ROSENN, Circuit Judges.

OPINION OF THE COURT

SEITZ, Chief Judge.

[1] This appeal arises out of the denial by the district court, 330 F.Supp. 834, of a motion to dismiss two impleaded defendants for lack of personal jurisdiction. The district court certified the question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and this court accepted the appeal. Pennsylvania law applies since federal jurisdiction here is predicated upon diversity of citizenship.

Appellants are two French companies, Societe de Construction du Bugey and Tichauer et Cie. The former manufactures a tower crane used in the construction industry; the latter is its exclusive world sales agent. These two companies were impleaded by the original defendant and present appellee, Bell Equipment Corporation. Bell is a New York corporation which previously represented appellants in the United States as their national sales agent. Bell has maintained an office in Pennsylvania at all times relevant to this suit.

Through Bell, one of appellants' tower cranes was sold in December, 1965 to the Marley Company, a Kansas corporation engaged in construction.[1] It was delivered in February, 1966 to a Marley jobsite in Beverley, Ohio and was used on that site until its completion in early 1968. That February, it was moved to a new jobsite at Huff, Pennsylvania. Bell aided Marley in setting up the crane

[1] Marley was also impleaded by Bell but is not involved in the instant appeal.

at both the Beverley and the Huff sites. In October, 1968, while being used at Huff, the crane collapsed and injured several workers, plaintiffs herein.[2]

The French companies are not registered to do business in the Commonwealth of Pennsylvania nor do they maintain an office in the state. At the time of the sale of the crane, they possessed a national sales agent, Bell; but apparently neither of the two cranes of appellant Societe's manufacture which Bell sold in the United States was sold or delivered in Pennsylvania. However, Bell maintained an office in Pennsylvania throughout this period.

By the summer of 1968, Bell had terminated its relationship with appellants. However, even though it had ceased to represent the two French firms, it continued to service in Pennsylvania the crane which it had sold to Marley.

While the crane was being used at Huff, individual delivery on six orders was made to the jobsite from the Societe factory in France by appellant Tichauer. Five of these orders had been placed by Marley on December 1, 1967, some three months prior to the removal of the crane to Pennsylvania; we believe these five orders constitute one transaction. A sixth order was also placed; however, on the record before us, it is impossible to determine when it was made. For purposes of our decision, we will assume it was made subsequent to the crane's removal to the Huff jobsite and represents a separate transaction. Marley was forced to order these parts directly from appellants in France because by that time, Bell had ceased to represent the two French firms. No solicitation by appellants was

[2] As with Marley, the plaintiffs are not involved in the instant appeal.

involved; rather, Bell had advised Marley to contact appellants directly since there was no domestic distributor of the parts. These parts were ordered from, and invoiced to, Marley's central office in Kansas City, Missouri. They were drop-shipped to the Pennsylvania construction site.

After a hearing, the district court concluded that sufficient contacts existed between Pennsylvania and appellants for personal jurisdiction to lie consistent with both constitutional and state statutory requirements.[3] In reviewing this determination, two questions are posed: (1) whether state statutory requirements in fact have been met; and (2) if so, whether personal service can be made upon appellants consistent with due process requirements of the Fourteenth Amendment.

I. THE EVOLUTION OF THE PENNSYLVANIA STATUTE.

In 1968, Pennsylvania amended the terms of its "long-arm" statute as applied to foreign corporations so as to extend its reach. It presently states:

> For the purposes of determining jurisdictions of courts within this Commonwealth, the doing by any corporation within this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object, or doing a single act in this Commonwealth for such purpose, with the intention of thereby initiating a series of such acts, shall constitute "doing business." For the purposes of this subsection, the shipping of merchandise directly or indirectly into or through this Commonwealth shall be considered the doing of such an act in this Commonwealth.

[3] There appears to be no dispute as to the operative facts. In addition to the recitation of facts in the district court's opinion, elements of our statement of facts have been gleaned from the interrogatories, depositions, and exhibits filed in the district court.

15 P.S. § 2011(C). This was the final step in a series of legislative responses to successive judicial interpretations of amendments to the "long-term" statute. In each case, the state courts had construed the legislative purpose as not intending to extend jurisdiction over a foreign corporation in a specified instance even though it was constructively present within the state. Each time, the legislature thereafter had amended the statute so as to broaden its scope.

For our purposes, only the last two amendments of the statute need be examined. The first amendment in 1963 involved the companion statute to § 2011(C)—§ 2011(B) [15 P.S. § 2011(B) (1967)]. Previous to the amendment, the statute had read, in part:

> Any foreign business corporation which shall have done any business in this Commonwealth, without procuring a certificate of authority to do so from the Department of State, shall be conclusively presumed to have designated the Secretary of the Commonwealth as its true and lawful attorney authorized to accept, on its behalf, service of process in any action arising [out of acts or omissions of such corporation] within this Commonwealth. . . .

Based upon this language, the Supreme Court of Pennsylvania had held that before jurisdiction over a foreign corporation would lie, the tortious activity sued upon must have arisen out of an act or omission by the foreign corporation while it was actually present within the state. Rufo v. Bastian-Blessing Co., 405 Pa. 12, 173 A.2d 123 (1961). The legislative response in 1963 was to amend § 2011(C) by striking out the requirement of "acts or omissions" within the Commonwealth—the language upon which the state supreme court had predicated its decision.

The second, and most recent, step came in response to judicial interpretations of the "doing business" and "entry" requirements found in the predecessor of § 2011 (C). The Superior Court of Pennsylvania construed the statute as not extending jurisdiction over a foreign lamp manufacturer which dealt through independent contractors in Pennsylvania. Cecere v. Ohringer Furniture Co., 208 Pa. Super. 138, 220 A.2d 350 (1966). This decision was based upon the interpretation the Supreme Court of Pennsylvania had given these terms. *See, e.g.*, Miller v. Kiamesha-Concord, Inc., 420 Pa. 604, 218 A.2d 309 (1966). The superior court concluded that although the Commonwealth had the constitutional power to reach the defendants, the legislative intent, as interpreted by the state supreme court, was not to extend state jurisdiction to those limits permissible under due process.

Two years later, in 1968, the legislature passed the current version of § 2011(C). It deleted the "entry" requirement and stipulated that "the shipping of merchandise directly or indirectly into or through this Commonwealth shall be considered 'doing business'". In so doing, the legislature eliminated the requirement of an actual corporate presence as a condition precedent to the exercise of jurisdiction over a foreign corporation. Rather, it made jurisdiction depend upon whether the corporation derived revenues from activity within the state; the distribution and marketing system which it set up for deriving those revenues was rendered immaterial for jurisdictional purposes.

[2] An additional factor which has been seen as influencing the passage of the 1968 amendment was the adoption by the Supreme Court of Pennsylvania of the position of

§ 402A, Restatement of Torts 2d, on strict liability in tort for defective products. The supreme court thereby sought to provide better protection for state residents against defective products. Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966). The passage of the amendment complemented these efforts by providing a local forum for suits against manufacturers of such products.

II. JUDICIAL INTERPRETATIONS OF THE 1968 AMENDMENT.

Since its passage, the Supreme Court of Pennsylvania has not had occasion to consider the new amendment and to define conclusively its scope. However, the federal district courts and the Superior Court of Pennsylvania each have had cases presenting the issue. Of the two cases considered by the superior court, only one provides any guidance; the other diverged onto the issue of whether the foreign corporation could be served consistent with due process mandates.[4]

The superior court case relevant for our consideration involved a contract between a foreign corporation and an announcer for one of its subsidiary corporations. The court held the plaintiff had failed to show that either the subsidiary corporation was merely a paper corporation for purposes of convenience or that more than one of these contracts with the parent corporation had been executed with employees of the subsidiary. Therefore, since only the one transaction was shown to have occurred involving the foreign corporation within the Commonwealth, and since there was no basis in the record for piercing the "corporate veil"

[4] DiLido Hotel v. Nettis, 215 Pa.Super. 284, 257 A.2d 643 (1969).

between the subsidiary and the foreign parent, the latter was not "doing business" within the Commonwealth for purposes of the statute. Lit v. Storer Broadcasting Co., 217 Pa.Super. 186, 269 A.2d 393 (1970).

Of those federal district courts which have considered the new amendment, a case before the District Court for the Eastern District of Pennsylvania was most closely analogous to our own. In that case, a crane manufactured by a Swedish company and similar in design to appellants' was being used on a construction project in Philadelphia. While being used on this site, it collapsed and injured several people. As here, the manufacturer had a national distributor; but none of its cranes had been sold in Pennsylvania. The crane which collapsed had been brought in by the purchaser—also a construction company, but only after it had been used on several other jobsites. Service was attempted on the Swedish company, which challenged the jurisdiction of the court. On these facts, the district court held the manufacturer amenable to service.

The court focused upon the statutory stipulation that the "[shipment] of merchandise . . . indirectly into . . . this Commonwealth" satisfied the "doing business" requirement. The court concluded that under this language, any product for which there is a national distributor has been "indirectly shipped" into the Commonwealth by the manufacturer whenever it is subsequently brought into the Commonwealth. For purposes of determining whether this indirect shipment has occurred, it is irrelevant who brought the instrumentality into the state. Further concluding the Supreme Court of Pennsylvania had liberally construed the term "doing business"—which had been in the statute

prior to the 1968 amendment, the court held the addition of the "indirect shipment" language in the amendment to extend jurisdiction of the state courts to the constitutional limit. Therefore, as to any manufacturer with a national distributor, should his product be brought subsequently into the Commonwealth and while there cause injury due to defective design and/or manufacture, statutory prerequisites for jurisdiction over that manufacturer on a suit arising out of the injury would be satisfied. Benn v. Linden Crane Co., 326 F.Supp. 995 (E.D.Pa.1970).

This theory, adopted by the district court in *Benn* and urged upon us by appellee Bell herein, has been characterized as the "stream of commerce" theory. Its basic premise is that by having a national distributor, the manufacturer has put his product into the national "stream of commerce." Under this theory, the manufacturer need only: (1) have a national distributor; and (2) be able to reasonably foresee that his product might be used anywhere. Therefore, for purposes of a subsequent injury, he is constructively doing business in every state and cannot complain should he thereby become amenable to one state's jurisdiction. If his product should come into a state, and because of the manufacturer's tortious conduct cause injury in that state, he is consequently subject to that state's jurisdiction regardless of who transported the instrumentality of the injury into the state. Applying this to the instant case, appellants did have a national distributor and could reasonably foresee that a construction crane would not be permanently affixed to any site but rather would be transported from jobsite to jobsite. Therefore, under this theory, the subsequent transportation of the crane into the

Commonwealth by Marley constituted an "indirect shipment" by appellants for purposes of the statute.

Central to this concept of "stream of commerce" is the definition given the term "place of the tort." For these purposes the place of the tort is not where the defective design or manufacture of the product occurred; instead, it is the site at which the tortious conduct culminates in injury. Thus, the defectively designed or manufactured product carries the manufacturer's tortious conduct with it. When that defect finally causes injury, the manufacturer is constructively considered to have committed the tortious act at the site of the injury because that is where the latent defect bloomed into a tort. In fact, this concept of "place of tort" has been adopted in Pennsylvania. *See, e.g.*, Wilk v. Ensign Bickford Co., 421 Pa. 161, 218 A.2d 778 (1966). Therefore, appellee Bell's contention that the cause of the injury here being sued upon was defective design and or manufacture of the crane alleges a corporate act by appellants within Pennsylvania.

The district court in the instant case adopted the theory set out in the *Benn* opinion as its own and refused to dismiss appellants for lack of jurisdiction. 330 F.Supp. 834, 836 (W.D.Pa.1971).

III. THE STATUTORY REQUIREMENT OF "DOING BUSINESS" WITHIN THE COMMONWEALTH.

For jurisdiction to lie under § 2011(C), a foreign corporation must do a "series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object, or . . . a single act in this Commonwealth, . . . with the intention of thereby initiating a

series of such acts." The last interpretation rendered this language was in 1967, a year before the current amendment. In construing the "series . . . or a single act" language, which has remained unchanged into the current statute, the court stated: "The statute contemplates a systematic course of conduct as contrasted with isolated or sporadic occurrences (Greco v. Bucciconi Engineering Co., 246 F.Supp. 261 (W.D.Pa.1965))." Myers v. Mooney Aircraft, Inc., 429 Pa. 177, 185, 240 A.2d 505, 510 (1967). In *Bucciconi*, the decision cited by the court, the district court concluded that the state supreme court had construed the "doing business" requirement as not extending state jurisdiction to the constitutional limit.

[3] The 1968 amendment eliminated the requirement of an actual presence or "entry" into the Commonwealth. Additionally, it added the "shipment" language so as to extend jurisdiction over foreign corporations regardless of the vagaries of each individual company's distribution and marketing system. However, neither of these changes affected the actual context surrounding the "doing business" requirement. Therefore, we conclude the validity of the definition of "doing business" rendered by the Supreme Court of Pennsylvania in the *Myers* decision was unaffected by the subsequent amendment. Because the legislature in the 1968 amendment did not change the wording in light of the state supreme court's decision in *Myers*, we are constrained to say the current Pennsylvania statute was not intended to extend the jurisdiction of the Pennsylvania courts to the maximum consistent with constitutional due process.

Having concluded the state statute does not reach the constitutionally permissible limit, our determination becomes whether, within the parameters of the state statute as previously defined by the state supreme court, appellants were doing business within the Commonwealth.

[4] First, because of the 1968 amendment, it is immaterial whether Bell be classified as an agent or an independent contractor. Second, we note no sales of appellants' crane have been made in Pennsylvania. Third, although Bell maintained an office in the Commonwealth at all times relevant to this case, the relationship between appellants and appellee Bell had terminated before the instant cause of action arose. Appellants thereby ended their contracts with the Commonwealth through Bell. This cessation of contracts with the state assumed a finality since there appears to have been no new national distributor appointed and since there had been no prior sale within the state. Therefore, the record establishes that prior to the collapse of the crane, appellants Societe and Tichauer had ceased to perform through an agent "a series of similar acts for the purpose of thereby realizing pecuniary benefit . . . or . . . a single act . . . for such purpose, with the intention of thereby initiating a series of such acts" within Pennsylvania. Thus, we conclude that statutory prerequisites for "doing business" by appellants under the terms of the 1968 amendment cannot be satisfied through the terminated agency of appellee Bell.

[5] The acts of appellants within this Commonwealth since their termination of the business relationship with Bell remain to be considered. These are: (1) the tortious

act of appellants within the Commonwealth, to wit, the collapse of the crane allegedly due to defective design and/or manufacture; and (2) the delivery of spare parts into Pennsylvania proximous in time to the collapse of the crane.

The *Bucciconi* case—the decision of the federal district court cited with approval by the Supreme Court of Pennsylvania in *Myers*—provides perspective on whether these post-termination acts were sufficient to establish the requisite contacts with the state for purposes of "doing business." There, a machine of defendant's manufacture had been brought into Pennsylvania although defendant company itself had no business dealings within the state. As here, no sale had been made within the Commonwealth. Subsequently, the user had problems with the machines; in order to iron them out, the president of the defendant company made several trips into the state. This, the district court had held, did not constitute "doing business" for purposes of the statute in the absence of other indicia of "doing business." In the language of the Supreme Court of Pennsylvania, this would be "isolated or sporadic occurrences" rather than a "systematic course of conduct." We note that as in the instant case, the tort occurred in Pennsylvania and was consequently an additional act of the defendant company within the Commonwealth under the "place of tort" theory.

Although there were six deliveries within the state, they represented no more than two transactions between the parties, one of which culminated some time before the crane was removed to Pennsylvania. We believe the five separate

deliveries within the Commonwealth pursuant to the December 1 transaction represented one "shipment" for purposes of § 2011(C), and the sixth delivery pursuant to the second transaction represented a second "shipment." In this context, we are unprepared to say the two shipments of spare parts into the state combined with the constructive tortious conduct within the state together demonstrated a systematic course of conduct within Pennsylvania by appellants. Rather, they are no more than sporadic occurrences and resultantly, are insufficient to satisfy statutory prerequisites for the exercise of personal jurisdiction by the state courts in the absence of a prior in-state sale.[5] Since federal jurisdiction in the instant case is predicated upon diversity of citizenship, the district court here can reach no farther than could a state court. Therefore, we are constrained to hold that personal jurisdiction does not lie over these appellants under the terms of the Pennsylvania "long-arm" statute. Having so concluded, it is unnecessary to consider whether service can be effected upon these appellants consistent with the dictates of the Due Process Clause of the Fourteenth Amendment.

[5] We note that had appellants effected a sale of one of their cranes within the Commonwealth, each of these elements might have assumed a distinctly different importance for purposes of satisfying state statutory prerequisites for the exercise of jurisdiction.

IV. CONCLUSION.

In conclusion, we hold appellants conducted insufficient activities within the Commonwealth as to render them amenable to personal service under the terms of the Pennsylvania "long-arm" statute, 15 P.S. § 2011 (Purdon Supp. 1972). Therefore, the district court erred in denying appellants Societe and Tichauer's motion to dismiss for lack of personal jurisdiction.

Accordingly, the order of the district court will be reversed and the case remanded to the district court for further proceeding.[6]

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[6] Subsequent to the filing of this opinion, appellee Bell's counsel brought to our attention a new amendment to § 2011(C), effective February 15, 1973. The new act reiterates the bases for jurisdiction in § 2011(C), discussed in this opinion. Additionally, it has a new subsection providing that the jurisdiction of the courts of the Commonwealth is to extend to the maximum allowed under the Constitution of the United States. 42 P.S. § 8309(b) (Purdon's Stat.Legis. Supp.1973).

The contested service was effected under the now repealed statute; however, the provisions for effecting service under both the old and the new statutes are the same. *Compare* 15 P.S. § 2011(B) (1967) *with* 42 P.S. § 8307 (Purdon Stat.Legis.Supp.1973). From this, appellee Bell urges that it has made effective service under the terms of the new statute, and that the new statute is to be retroactively applied to the instant case. However, the only service which has been effected is that made under the prior statute, which we have held not to reach appellants. We do not believe that ineffective service under the old statute can be validated merely by the subsequent passage of a new jurisdictional statute with more inclusive provisions.

Since Bell has not attempted service under the new statute, we need not consider any remaining issues on retroactive versus prospective application nor on the constitutional efficacy of such service if made.

Opinion and Order of Judge Miller.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JAMES A. GORSO,
Plaintiff,

v.

BELL EQUIPMENT CORPORATION,
a corporation,
Defendant,

v.

THE MARLEY COMPANY, a corporation and SOCIETE DE CONSTRUCTION MECANIQUES DU BUGEY and TICHAUER ET CIE,
Third Party Defendants.

Civil Action No. 68-1356

JACK CHICONELLA,
Plaintiff,

v.

BELL EQUIPMENT CORPORATION,
a corporation,
Defendant,

v.

THE MARLEY COMPANY, a corporation and SOCIETE DE CONSTRUCTION MECANIQUES DU BUGEY and TICHAUER ET CIE,
Third Party Defendants.

Civil Action No. 69-20.

CLYDE A. TEVIS,

Plaintiff,

v.

BELL EQUIPMENT CORPORATION,
a corporation,

Defendant,

v.

THE MARLEY COMPANY, a corporation and SOCIETE DE CONSTRUCTION MECANIQUES DU BUGEY and TICHAUER ET CIE,

Third Party Defendants.

Civil Action No. 69-21.

HARRY J. PHILLIPS,

Plaintiff,

v.

BELL EQUIPMENT CORPORATION,
a corporation,

Defendant,

v.

THE MARLEY COMPANY, a corporation and SOCIETE DE CONSTRUCTION MECANIQUES DU BUGEY and TICHAUER ET CIE,

Third Party Defendants.

Civil Action No. 69-23.

RICHARD E. McKENNA,

Plaintiff,

v.

BELL EQUIPMENT CORPORATION,
a corporation,

Defendant,

v.

THE MARLEY COMPANY, a corporation and SOCIETE DE CONSTRUCTION MECANIQUES DU BUGEY and TICHAUER ET CIE,

Third-Party Defendants.

Civil Action No. 70-1164.

AMEDIO VITALE,

Plaintiff,

v.

BELL EQUIPMENT CORPORATION,
a corporation,

Defendant.

v.

THE MARLEY COMPANY, a corporation and SOCIETE DE CONSTRUCTION MECANIQUES DU BUGEY and TICHAUER ET CIE,

Third-Party Defendants.

Civil Action No. 70-1177.

Appendix A—Opinion and Order of Judge Miller

THE MARLEY COMPANY, a corporation,
Plaintiff,

v.

BELL EQUIPMENT CORPORATION,
a corporation,
Defendant,

v.

SOCIETE DE CONSTRUCTION MECANIQUES
DU BUGEY and TICHAUER ET CIE,
Third Party Defendants.

Civil Action No. 71-223.

OPINION.

MILLER, J.

Now pending before the Court are the third-party defendants' motions to dismiss the third party complaint for lack of jurisdiction over the person, insufficiency of process and insufficiency of service of process. A brief statement of the background of this litigation is necessary to our disposition of the motions.

The plaintiffs filed their respective complaints in diversity actions for personal injuries and in the case of The Marley Company for property and consequential damages they sustained when a Pignon Crane collapsed at a construction cite near the Village of Huff, Indiana County, Pennsylvania. Relying upon the theory of strict liability, Restatement of Torts (2d) § 402A, the plaintiffs alleged defendant Bell, a national sales corporation engaged in

selling construction cranes and similar equipment, sold a crane to The Marley Company in an unreasonably dangerous defective condition. Thereafter, Bell impleaded Societe de Construction Mecaniques du Bugey, the manufacturer of the crane, and Tichauer et Cie, the world wide sales agent who sold the crane to Bell f.o.b. Belley, France. Both third-party defendants are French enterprises not registered to do business in the Commonwealth of Pennsylvania nor did they maintain an office within the Commonwealth. Furthermore, at the time this crane was sold to Bell by Tichauer et Cie and by Bell to The Marley Company, Bell by contract with both French Corporations had the exclusive sales rights for the tower cranes in the United States of America and Puerto Rico. Motions to dismiss the impleaded defendants for lack of personal jurisdiction were filed and denied by Judge Knox with the issue certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Court of Appeals accepted the appeal and after considering the evolution of the Pennsylvania "long-arm" statute;[1] judicial interpretations of the 1968 amendment thereto; the statutory requirement of "doing business" within the Commonwealth; concluded the third-party defendants conducted insufficient activities within the Commonwealth as to satisfy the statutory prerequisites for the exercise of personal jurisdiction. Consequently, it held, "the district court erred in denying appellants Societe and Tichauer's motion to dismiss for lack of personal jurisdiction." *Gorso v. Bell Equipment Corporation*, 476 F. 2d 1216, 1223 (3 Cir. 1973). The appeals court in note 6 acknowledges amendment of the "long-arm" statute effective February 15, 1973, and disposed of Bell's argument it had made effective service

[1] 18 P.S. § 2011.

under the terms of the new statute by stating, "[w]e do not believe that ineffective service under the old statute can be validated merely by the subsequent passage of a new jurisdictional statute with more inclusive provisions. Since Bell has not attempted service under the new statute," the appellate court commented, "we need not consider any remaining issues on retroactive versus prospective application nor on the constitutional efficacy of such service if made." *Id.*

Mindful of the Court's comments as to service under the new "long-arm" statute, the third-party plaintiff moved and was granted leave to join Societe and Tichauer on May 21, 1973. Service of process was made by certified mail on the Secretary of the Commonwealth on June 7, 1973, and on the Department of State July 30, 1973, with service by registered mail to the third-party defendants on July 31, 1973. It is as a result of these latest events that the impleaded third-party defendants move to dismiss for lack of personal jurisdiction and sufficiency of process. The third-party defendants argue the amendments to the Pennsylvania "long-arm" statute,[2] defining in more liberal terms what constitutes doing business by foreign corporations has no retroactive effect to an action initiated against them in October 1970; they aver the decision of the Court of Appeals unappealed from constitutes the law of the case; next they maintain if the amended long-arm statute were applied to them, it would be an unconstitutional denial of due process because of their minimum business contacts with the Com-

[2] Formerly 15 P.S. § 2011 which was repealed in November 1972, by 15 P.L. _____, No. 271, § 5. The statute now appears at 42 P.S. § 8301 *et seq.*, as amended.

monwealth of Pennsylvania; and lastly, they claim the amended long-arm statute is unconstitutional as enacted because of a distinction made between non-qualified foreign corporations and non-resident individuals in that the amendments apply to the latter class only on or after August 30, 1970.

In *Benn v. Linden Crane Company*, 370 F. Supp. 1269 (E.D. Pa. 1973), the Court considered the applicability of the new Pennsylvania "long-arm" statute in a factual setting similar to the instant case. The cause of action arose and the complaint was filed prior to the effective date of the "long-arm" statute. Re-service was made after the effective date of the statute which was challenged by the defendant foreign corporation. Thus, at issue was whether the validity of the re-service is governed by 15 P.S. § 2011, the law in effect at the time of the accrual of the cause of action and filing of the complaint, or 42 P.S. § 8301 *et seq.*, the law in effect at the time re-service was made. The Court, after reviewing and considering the background of judicial precedent on the issue concluded "that the new 'long-arm' statute is procedural * * * [it] governs the validity of the re-service in this case as it is the law in effect at the time re-service was made." *Id.* 1274.

We see little, if any, distinction between the situation in *Benn* and the instant case of an impleaded third-party defendant foreign corporation. We are in agreement with the Court in *Benn* that the new Pennsylvania "long-arm" statute is procedural and conclude that it governs the validity of the re-service as it was the law in effect at the time re-service was made. To the persuasive and well-reasoned opinion in *Benn*, we would add only the following

observations of the Pennsylvania Supreme Court in *Myers v. Mooney Aircraft, Inc.*, 429 Pa. 177 (1967) at page 183:

> "Statutes which are designed to change the mode of judicial procedure, where such change relates to the method of enforcing a right and does not affect the right itself, are construed to apply to causes of action which accrued before enactment as well as to those to accrue thereafter.":

and in *Wenzel v. Morris Dist. Co., Inc.*, 439 Pa. 364 (1970) at page 371:

> "This Court has long since recognized that '[t]he purpose of the Act * * * [the Business Corporation Law] is to bring foreign corporations doing business in this State within the reach of legal process. The act is for the protection of those with whom such corporations do business or to whom they may incur liabilities by their wrongful acts.' [Citation omitted] Moreover, * * * the legislature, by successive amendments to the Business Corporation Law, has greatly extended the jurisdiction of the courts of this Commonwealth over non-registered foreign corporations."

We turn to the contention that the unappealed decision of the Court of Appeals in *Gorso v. Bell Equipment Corporation, supra*, constitutes the law of the case and therefore is finally dispositive of the issue of *in personam* jurisdiction over the third-party defendants. Although this theory is raised in their brief, the third-party defendants cite no cases supporting its applicability to this case in its present factual setting. The third-party plaintiff, on the other hand, argues the principle of law is not applicable for the appellate court construed the procedural law in effect at the time the first service of process was made. We agree with the third-party plaintiff that the Court of Appeals did

not rule upon the validity of the service of process under the new statute, the constitutional efficacy of the same, if made, nor upon the retroactive versus prospective application of the statute.[3] Thus even if the doctrine is applicable in this area of the law, it would not come to play under the present factual setting in view of the fact that the Court of Appeals has not ruled on the issue now pending before this Court.

We consider next the third-party defendants' argument against subjecting them to *in personam* jurisdiction. Although counsel for the third-party defendants admits having stipulated the third-party defendants are unregistered French corporations, he is not satisfied such is their current status and states in his brief[4] he hopes to have a reply in time for oral argument on his motion. No further explanation has been provided. Consequently, we shall rely upon the stipulated fact that the third-party defendants are unregistered foreign corporations. Since the Court of Appeals held that the third-party defendants were not "doing business" within the Commonwealth under the terms of § 2011(c), the former "long-arm" statute, we must determine if the new statute commands a different result. In this connection, it is beyond dispute that the following acts of the third-party defendants occurred in the Commonwealth: (1) the delivery of spare parts into Pennsylvania approximately in time to the collapse of the crane; and, (2) the tortious act of the third-party defendants within Pennsylvania, namely, the collapse of the crane

[3] *Gorso v. Bell Equipment Corporation*, 176 F. 2d at page 1223, note 6.

[4] Page 6, Brief in Support of Motion to Dismiss.

allegedly due to defects in design or manufacture.[5] As previously mentioned, the Court in *Gorso* held these acts insufficient to satisfy the statutory prerequisites[6] for the exercise of personal jurisdiction by state courts in the absence of a prior in-state sale. Under the former "long-arm" statute, the Court concluded the direct or indirect shipment of merchandise into the state did not alone constitute "doing business" without the showing of systematic or continuous conduct. However, under the new "long-arm" statute, 42 P.S. § 8309(a)(3),[7] the direct or indirect shipment of merchandise into the Commonwealth constitutes "doing business" for the purpose of service of process upon non-qualified foreign corporations and the exercise of *in personam* jurisdiction over them in the Courts of the Commonwealth. The Court in *Aquarium Pharm., Inc. v. Industrial Press & Pack., Inc.*, 358 F. Supp. 441, 443 (E. D. Pa. 1973), in analyzing the new statute observed, "[n]o longer is intention a necessary prerequisite to the imposition of jurisdiction; *the fact of shipment into the Common-*

[5] See *Gorso v. Bell Equipment Corporation*, 476 F. 2d at 1222, where the Appellate Court recognized six deliveries within the State but found the deliveries to represent no more than two transactions between the parties. The Court was unprepared to say the two shipments of spare parts combined with the constructive tortious conduct together demonstrated a systematic course of conduct within Pennsylvania; and Answers of Marley Company to interrogatories of Bell regarding shipments of merchandise into Pennsylvania by third-party defendants.

[6] 18 P.S. § 2011(c).

[7] "(a) Any of the following shall constitute 'doing business' for the purpose of this chapter:

* * *

(3) The shipping of merchandise directly or indirectly or through this Commonwealth."

wealth, standing by itself, subjects the acting corporation or entity to the reach of the § 8309 'long-arm' statute."[8] **(emphasis added).**

It is clear to us that the third-party defendants had shipped merchandise into this Commonwealth. Therefore, it is our opinion they were "doing business" under § 8309 (a)(3) which permits substituted service upon the Department of State, and such service once made on the third-party defendants, clothes this Court with Jurisdiction over the instant case. We believe our decision on this issue is consistent with the clear intention of the legislature as is evidenced by the recent amendment[9] expressing the public policy of Pennsylvania that the jurisdiction and venue of courts of the Commonwealth shall extend to all foreign corporations to the fullest extent allowed under the Constitution of the United States.

Remaining for consideration are the constitutional due process and equal protection attacks upon the new "long-arm" statute. We believe the due process argument under the test of *International Shoe Co. v. Washington*, 326 U.S.

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[8] Although not decided until June 14, 1973, approximately two months after the Circuit's opinion in *Gorso*, the Pennsylvania Superior Court in *McCrory Corp. v. Girard Rubber Corp.*, 225 Pa. 5, 15 (1973) held under § 2011(c), that a nonregistered manufacturer met the "long-arm" test of "doing business" in the Commonwealth by making "indirect shipments" therein. The nonregistered manufacturer of suction tips which were to be placed upon toy arrows, sold its product to a nonresident middle man who in turn produced the arrows and sold the finished product to a Pennsylvania retailer in Pennsylvania. The Superior Court found that "Girard could reasonably foresee that its product would be sold 'as part of the whole' arrow to outlets around the country, and that Pennsylvania would be one such market." The Supreme Court allowed an appeal but no opinion has been handed down since oral argument late in 1973.

[9] 42 P.S. § 8309(b); and *Wenzel v. Morris Dist. Co., Inc., supra.*

310 (1945), and its progeny, see, *e.g.*, *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957); *Perkins v. Benguet Consolidated Mining Company*, 342 U.S. 437 (1952); *Campbell v. Triangle Corp.*, 336 F. Supp. 1002 (E.D. Pa. 1972); *Scafati v. Bayerische Motoren Werke AG*, 53 F.R.D. 256 (W.D. Pa. 1971), to be unpersuasive. It does not offend our concept of the "traditional notions of fair play and substantial justice" to conclude that if we are to permit litigation on the theory of strict liability against the sellers of products, we should likewise require the manufacturers of those products to defend the products in the forum state where the tortious act occurred as a result of the use of its products and where repair parts had been intentionally shipped into the state in conjunction with the maintenance and use of the product. It cannot be maintained the international shipment of merchandise into the Commonwealth from France came to rest therein through a fortuity. We can discern little if any distinction in international trade versus interstate commerce. If a Wisconsin manufacturer is required to defend his product here,[10] we see little reason in not requiring French corporations to do the same so long as both ship goods into Pennsylvania.

The equal protection argument is without merit since all nonqualifying foreign corporations are treated alike. Equal protection and its guaranty of like treatment permits classification which is reasonable and which is based upon differences having a reasonable relation to the object or purpose dealt with or to the public purpose sought to be achieved by the legislation involved. The equal protection

[10] *Aquarium Pharm., Inc. v. Industrial Press & Pack., Inc.*, 358 F. Supp. 441 (E.D. Pa. 1973).

clause does not forbid discrimination with respect to things that are different. *Puget Sound Co. v. Seattle*, 291 U.S. 619 (1934). In this respect, the distinction the third-party defendants urge upon us relates to the exercise of jurisdiction by the Commonwealth courts over qualified foreign corporations, nonqualified foreign corporations and nonresident individuals as if they were all nonresident persons. Their argument ignores the obvious difference between the artificial person or corporate entity and the natural person or persons conducting business individually or through a fictitious name, or agent, servant or employee and the substantive law of the Commonwealth pertaining thereto. It is beyond question that the Federal Constitution in no way undertakes to control the power of a state to determine by what process legal rights may be asserted, legal obligations enforced or the extent to which the jurisdiction and venue of the courts of the Commonwealth shall extend save that the method of procedure gives reasonable notice and affords fair opportunity to be heard before the issues are decided. See *Iowa Central Railway Company v. Iowa*, 160 U.S. 389 (1896).

For the foregoing reasons, the third-party defendants' motions to dismiss shall be denied. Furthermore, since service has been made by serving the Department of State with copies by registered mail to the third-party defendants, there can be no question of the sufficiency of service of process.[11]

An appropriate order shall be entered.

---

[11] 42 P.S. § 8307.

Order of Court

AND NOW, to-wit, this 7 day of June, 1974, it is hereby ORDERED and DIRECTED that the third-party defendants' Motions to Dismiss be and the same hereby are denied.

JOHN L. MILLER,
United States District Judge.

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Judge Miller's Subsequent Order

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JAMES A. GORSO,
Plaintiff,

v.

BELL EQUIPMENT CORPORATION,
a corporation,
Defendant and Third-Party Plaintiff,

v.

THE MARLEY COMPANY, a corporation and SOCIETE DE CONSTRUCTION MECANIQUES DU BUGEY and TICHAUER et CIE.
Third-Party Defendants.

Civil Action No. 68-1356,
with
69-20, 69-21,
69-22, 69-23,
70-1164, 70-1177
and 71-223.

Appendix A—Judge Miller's Subsequent Order

ORDER OF COURT

The motion filed by the third-party defendants, Societe de Construction Mecaniques du Bugey and Tichauer et Cie, for an amendment to our Order of June 7, 1974, which denied the third-party defendants' motion to dismiss for want of jurisdiction, is granted and it is hereby ORDERED that pursuant to 28 U.S.C. § 1292, the Court is of the opinion that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation. Any application for an appeal filed hereunder shall not stay proceedings unless otherwise ordered by the Court of Appeals or a Judge thereof.

Dated: August 6, 1974.

JOHN L. MILLER,
United States District Judge.

cc: Counsel of record.

Appendix A—Order of the Court of Appeals

Order of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

C. A. Misc. Record No. 74-8189.

JAMES A. GORSO, *et al.*,

Plaintiffs,

vs.

BELL EQUIPMENT CORPORATION,

Defendant,

vs.

THE MARLEY COMPANY, a corporation and SOCIETE de CONSTRUCTION MECHANIQUES du BUGEY and TICHAUER et Cie,

Petitioners.

(W.D. of Pa. Nos. 68-1356, 69-20, 69-21, 69-23, 70-1164, 70-1177, 71-223)

Present: SEITZ, *Chief Judge*, GIBBONS and GARTH, *Circuit Judge.*

Upon consideration of petitioners' application for leave to appeal in the above-entitled case, pursuant to the provisions of 28 U.S.C. § 1292(b)

Appendix A—Order of the Court of Appeals

It is ORDERED that the answer of respondent, Bell Equipment Corporation, which was received out of time, be and hereby is filed as of August 27, 1974; and

It is Further ORDERED that petitioners' application for leave to appeal pursuant to the provisions of 28 U.S.C. § 1292(b) be and hereby is denied.

BY THE COURT,
COLLINS J. SEITZ,
Chief Circuit Judge.

Dated: September 5, 1974.

APPENDIX B

Pennsylvania Act of November 15, 1972

PART VI.

ACTIONS AND PROCEEDINGS GENERALLY

Chap. Sec.
83. Bases Of Jurisdiction 8301

CHAPTER 83.—BASES OF JURISDICTION

Sec.
8301. Qualified foreign corporations.
8202. Nonqualified foreign corporations.
8303. Commission of tortious acts by individuals.
8304. Doing business by individuals.
8305. Causing harm by individuals.
8306. Death of individuals.
8307. Procedure for service of process.
8308. Federal actions.
8309. Acts affecting jurisdiction.
8310. Subpoena to foreign corporations to produce records.
8311. Notice to Insurance Department.

DERIVATION TABLE

Showing the source of sections of Title 42 of Consolidated Pennsylvania Statutes in Purdon's Pennsylvania Statutes Annotated, repealed by Acts 1972, Nov. 15, No. 271.

New Title 42 Sections	*Repealed Sections*
8301 et seq.	15 P.S. § 12132
8301	15 P.S. § 7912
8302	15 P.S. § 7912
8303	12 P.S. § 341
8304	12 P.S. § 342
8305	12 P.S. § 343
8306	12 P.S. § 345
8307	12 P.S. § 346
8308	15 P.S. § 2011
8309	12 P.S. § 344
8310	15 P.S. § 2011.1

§ 8301. QUALIFIED FOREIGN CORPORATIONS

(a) *General rule.*—Service of process against a qualified foreign business corporation or a qualified foreign corporation not-for-profit, upon the Secretary of the Commonwealth or Department of State, shall be made in the manner provided by section 8307 of this title (relating to procedure for service of process).

(b) *Issuing Authority.*—Such process may be issued by any court, magistrate, or justice of the peace having jurisdiction of the subject matter of the controversey in any county of the Commonwealth in which the corporation shall have its registered office, or in the country in which the right of action arose.

(c) *Cumulative remedy.*—Nothing contained in this section shall limit or affect the right to serve any process, notice, or demand, required or permitted by law to be served upon a foreign corporation, in any other manner now or hereafter permitted by law.

1972, Nov. 15, P.L. ____, No. 271, § 8301, eff. in 90 days.

Title of Act:

An act amending the act of November 25, 1970 (No. 230), entitled "an act codifying and compiling a part of the law of the Commonwealth," adding provisions relating to burial grounds, corporations, including corporations not-for-profit, educational institutions, private police, certain charitable or eleemosynary institutions, certain nonprofit insurers, service of process on certain nonresident persons, names, prescribing penalties and making repeals. 1972, Nov. 15, No. 271, eff. in 90 days.

§ 8302. NONQUALIFIED FOREIGN CORPORATIONS

(a) *General rule.*—Any foreign corporation which shall have done any business in this Commonwealth without procuring a certificate of authority to do so from the Department of State as required by statute, shall be conclusively presumed to have designated the Department of State as its true and lawful attorney authorized to accept, on its behalf, service of process in any action arising within this Commonwealth. Service of process shall be made in the manner provided by section 8307 of this title (relating to procedure for service of process).

(b) *Issuing authority.*—Such process may be issued by any court, magistrate, or justice of the peace having jurisdiction of the subject matter of the controversy.

(c) *Cumulative remedy.*—Nothing contained in this section shall limit or affect the right to serve any process, notice or demand, required or permitted by law to be served upon a foreign corporation, in any other manner now or hereafter permitted by law.

1972, Nov. 15, P.L. ____, No. 271, § 8302, eff. in 90 days.

§ 8303. COMMISSION OF TORTIOUS ACTS BY INDIVIDUALS

Any nonresident of this Commonwealth who, acting individually, under or through a fictitious business name, or through an agent, servant or employee, shall have committed a tortious act within this Commonwealth on or after August 30, 1970, or any such individual who at the time of the commission of the tortious act within this Commonwealth was a resident of this Commonwealth who shall subsequently become a nonresident or shall conceal his where-

abouts, shall be conclusively presumed to have designated the Department of State as his agent for the receipt of service of process in any civil action or proceeding instituted in the courts of this Commonwealth against such individual.

1972, Nov. 15, P.L. ____, No. 271, § 8303, eff. in 90 days.

Cross References

Foreign corporations, service of process, see 15 P.S. § 2011.

Motor vehicle or motor boat operation, action against nonresident, see 75 P.S. § 2001.

Real estate, action against non-residents, see section 331 et seq. of this title.

Service on agents of non-residents, see section 297 of this title.

1. In general

In face of constitutionality of Pennsylvania long-arm statute, and compliance with procedures by plaintiff, fact that defendant never actually received complaint and summons was of no consequence. McCully-Smith Associates, Inc. v. Armour & Co., 358 F.Supp. 331, D.C. 1973.

"Long-arm service" on non-residents who have committed tortious acts within state authorizing "long-arm service" does not violate due process. *Id.*

§ 8304. DOING BUSINESS BY INDIVIDUALS

Any nonresident of this Commonwealth who, acting individually under or through a fictitious business name, or through an agent, servant or employee, shall have done any business in this Commonwealth on or after August 30, 1970, or a resident of this Commonwealth who shall have done business in this Commonwealth on or after August 30, 1970

and thereafter shall have become a nonresident of this Commonwealth or shall conceal his whereabouts, shall be conclusively presumed to have designated the Department of State as his agent for the receipt of service of process in any civil action or proceeding instituted in the courts of this Commonwealth against such individual, if and only if at the time the cause of action accrued or the harm or financial loss occurred, the nonresident or the resident who shall thereafter have become a nonresident, shall have been doing any business within this Commonwealth as heretofore provided.

1972, Nov. 15, P.L. ____, No. 271, § 8304, eff. in 90 days.

§ 8305. CAUSING HARM BY INDIVIDUALS

Any nonresident of this Commonwealth who, acting outside of this Commonwealth, individually, under or through a fictitious business name, or through an agent, servant or employee, shall have caused any harm within this Commonwealth on or after August 30, 1970, shall be subject to service of process in any civil action or proceeding instituted in the courts of this Commonwealth arising out of or by reason of any such conduct. Service of process in any such civil action or proceeding shall be effected through the Department of State as provided in this chapter.

1972, Nov. 15, P.L. ____, No. 271, § 8305, eff. in 90 days.

§ 8306. DEATH OF INDIVIDUALS

Where, prior to the commencement of an action or proceeding pursuant to this chapter, or subsequent to the commencement of an action or proceeding but prior to service, the nonresident of this Commonwealth or the resident who

shall thereafter have become a nonresident of this Commonwealth, has died, service of process shall be made on the personal representative, executor or administrator of such nonresident in the same manner as is provided in the case of a nonresident. Where an action or proceeding has been duly commenced, under the provisions of this chapter, by service upon a defendant who dies thereafter, if the personal representative, executor or administrator of such defendant does not voluntarily become a party, he may be constituted as a party under the applicable Rules of Civil Procedure, and service of process shall be made in the same manner as provided in this chapter upon the Department of State.

1972, Nov. 15, P.L. ____, No. 271, § 8306, eff. in 90 days.

§ 8307. Procedure for service of process

Process directed to persons under this chapter shall be served, by the officer to whom such process shall be directed, upon the Department of State, by sending by registered or certified mail, postage prepaid, a true and attested copy of such process, with the fee required by law, and by sending to the defendant, by registered or certified mail, postage prepaid, a true and attested copy thereof, with an endorsement thereon of the service upon the Department of State, addressed to such defendant at his last known address. The Department of State shall keep a record of the day and hour of the service of such process on it. The registered or certified mail return receipts of the Department of State and of such defendant shall be attached to and made a part of the return of service of such process, except that if the defendant refuses to accept the notice mailed, or cannot be

found at his last known address, the registered or certified mail return receipt or other evidence of such facts shall be attached to and made a part of the return and shall constitute sufficient service under the provisions of this section. The fee paid by the plaintiff to the Department of State at the time of the service shall be taxed as costs to the plaintiff, if he prevails in the action necessitating the service of the process.

1972, Nov. 15, P.L. ____, No. 271, § 8307, eff. in 90 days.

1. *In general*

French manufacturer of crane and French company acting as its exclusive world sales agent were not "doing business" in Pennsylvania within former provisions of Pennsylvania long-arm statute though crane brought into Pennsylvania by purchaser collapsed in Pennsylvania and though spare parts had been sent into Pennsylvania by such agent; such alleged bases of jurisdiction were mere sporadic occurrences. Gorso v. Bell Equipment Corp., 476 F.2d 1216, C.A. 1973.

Where French manufacturer of crane had terminated its relationship with national sales agent, which had office in Pennsylvania, before crane collapsed and no new national agent was appointed and there had been no prior sale within the Commonwealth, manufacturer was not "doing business" in Pennsylvania, within former provisions of Pennsylvania long-arm statute, through such agency. *Id.*

In enacting 1968 amendment of Pennsylvania long-arm statute, 15 P.S. § 2011 (repealed see, now, this section) legislature was motivated at least in part by desire to provide local forum for suits against foreign manufacturers of defective products. *Id.*

Pennsylvania long-arm statute as amended in 1968 15 P.S. § 2011 (repealed, see, now, this section) not yet reach constitutionally permissible limit. *Id.*

In face of constitutionality of Pennsylvania long-arm statute, and compliance with procedures by plaintiff, fact that defendant never actually received complaint and summons was of no consequence. McCully-Smith Associates, Inc. v. Armour & Co., 358 F.Supp. 331, D.C. 1973.

"Long-arm service" on nonresidents who have committed tortious acts within state authorizing "long-arm service" does not violate due process. *Id.*

§ 8308. FEDERAL ACTIONS

Where process is issued against any corporation or individual by any court of the United States empowered to issue such process under the laws of the United States, the Department of State is authorized to receive such process in the same manner and with the same effect as provided in this chapter for process issued by the courts of this Commonwealth.

1972, No. 15, P.L. ____, No. 271, § 8308, eff. in 90 days.

§ 8309. ACTS AFFECTING JURISDICTION

(a) GENERAL RULE.—Any of the following shall constitute "doing business" for the purposes of this chapter:

(1) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(2) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.

(3) The shipping of merchandise directly or indirectly into or through this Commonwealth.

(4) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by the Commonwealth or any of its agencies.

(5) The ownership, use or possession of any real property situate within this Commonwealth.

(b) EXERCISE OF FULL CONSTITUTIONAL POWER OVER FOREIGN CORPORATIONS.—In addition to the provisions of subsection (a) of this section the jurisdiction and venue of courts of the Commonwealth shall extend to all foreign corporations and the powers exercised by them to the fullest extent allowed under the Constitution of the United States.

(c) EXCEPTION.—Notwithstanding any other provision of this section, for the purposes of determining jurisdiction of courts within this Commonwealth, inspecting, appraising and acquiring real estate and mortgages, and other liens thereon, and personal property and security interest therein, and holding, leasing away, conveying and transferring the same, as fiduciary or otherwise, or collecting debts and enforcing mortgages and rights in property securing the same by any foreign corporation shall not constitute "doing business."

1972, Nov. 15, P.L. ____, No. 271, § 8309, eff. in 90 days.

1. *In general*

Where defendant corporation, whose shareholder list plaintiff stockholders sought to examine and copy, was not registered to do business in Pennsylvania, it did not maintain an office in Pennsylvania, none of its

directors or officers were residents of Pennsylvania, and its books and records were maintained at its principal place of business in New York, federal district court, sitting as a Pennsylvania court for diversity purposes, would not exercise its properly invoked jurisdiction. Genetti v. Victory Markets, Inc., 362 F.Supp. 124, D.C. 1972.

Actions of defendant which made single shipment of work in progress inventory belonging to plaintiff Pennsylvania corporation upon telephone request by plaintiff to defendant's Wisconsin office fell within ambit of Pennsylvania long-arm statute which became effective on February 13, 1973. Aquarium Pharmaceuticals, Inc. v. Industrial Pressing & Packaging, Inc., 358 F.Supp. 441, D.C. 1973.

Pennsylvania long-arm statute, if interpreted to cover defendant, which maintained no office in Pennsylvania and had not done any business in the state other than making of a single shipment of work in progress inventory belonging to plaintiff Pennsylvania corporation upon telephone request by plaintiff to defendant's Wisconsin office, was not unconstitutional. *Id.*

Where foreign corporation, which manufactured suction tips to be placed on toy arrows, took orders from customers in Pennsylvania by telephone and through the mails and made deliveries into Pennsylvania at its own expense and its gross sales in Pennsylvania amounted to 5% of its total volume of business, manufacturer had been doing business in Pennsylvania, within meaning of long-arm statute, and was properly subjected to *in personam* jurisdiction in retailer's suit seeking indemnity for judgment recovered by minor boy injured by toy arrow having defective rubber suction cup tip. McCrory Corp. v. Girard Rubber Corp., 307 A.2d 435, Super. 1973.

Where foreign corporation manufactured suction tips specifically to be placed on toy arrows and sold its product to middleman, which in turn produced toy

arrows and sold finished product to Pennsylvania retailer, manufacturer could reasonably foresee that product would be sold as part of whole arrow to outlets around the country and that Pennsylvania would be one such market; thus, manufacturer had shipped merchandise "indirectly into or through this Commonwealth," within meaning of long-arm statute, and, thus, was subject to *in personam* jurisdiction in retailer's suit seeking indemnity for judgment recovered by minor boy injured by toy arrow having defective rubber suction cup tip. *Id.*

"Doing business," as used in long-arm statute, is determined by overall conduct of the defendant and not just isolated activity. *Id.*

§ 8310. SUBPOENA TO FOREIGN CORPORATIONS TO PRODUCE RECORDS

Any court of this Commonwealth may issue its subpoena with clause of *duces tecum* upon any foreign corporation within the jurisdiction of the court, directing such foreign corporation, its proper officers, agents or employees, to produce before such court any books, papers, records and documents in the possession of such foreign corporation as shall be designated in such subpoena. Such subpoena with clause *duces tecum* may be served upon such foreign corporation in the manner provided by this chapter for the service of process upon foreign corporations.

1972, Nov. 15, P.L. ____, No. 271, § 8310, eff. in 90 days.

1. *In general*

On the basis of the incomplete record made at hearing on preliminary objections alleging lack of jurisdiction over defendants, plaintiff's evidence tended to show that profit-sharing fund which was domiciled in Illinois and which was created by corporation having

office in Pennsylvania had sufficient minimal contacts with Pennsylvania to permit Pennsylvania court to exercise personal jurisdiction over fund. Alumbaugh v. Wallace Business Forms, Inc., 313 A.2d 281, Super. 1973.

§ 8311. NOTICE TO INSURANCE DEPARTMENT

The Department of State shall forward to the Insurance Department for its information each process, or a copy thereof, received by the Department of State with respect to any fraternal benefit society or other insurer subject to the jurisdiction of the Insurance Department.

1972, Nov. 15, P.L. ____, No. 271, § 8311, eff. in 90 days.

Act of July 20, 1968, P. L. 216, § 54

Section 54. Subsections C and D of section 1011 of the act, subsection C amended August 13, 1963 (P. L. 703) and subsection D added January 18, 1966 (P. L. 1305), are amended to read:

Section 1011. Service of Process Upon the Secretary of the Commonwealth.—* * *

C. For the purposes of determining jurisdiction of courts within this Commonwealth, the [entry of] doing by any corporation [into] in this Commonwealth [for the doing] of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object, or doing a single act in this Commonwealth for such purpose, with the intention of thereby initiating a series of such acts, shall constitute "doing business." For the purposes of this subsection the shipping of merchandise directly or indirectly into or through this Commonwealth shall be considered the doing of such an act in this Commonwealth.

D. For the purpose of determining jurisdiction of courts within this Commonwealth, [the entry of any foreign business corporation into this Commonwealth for the purpose of] inspecting, appraising and acquiring real estate and mortgages, and other liens thereon, and personal property and security interests therein, and holding, leasing away, conveying and transferring the same, as fiduciary or otherwise, or [for the purpose of] collecting debts and enforcing mortgages and rights in property securing the same by any foreign business corporation shall not constitute "doing business."

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IN THE

Supreme Court of the United States

October Term, 1974

74-
No. 696

SOCIETE DE CONSTRUCTION MECANIQUES DU BUGEY and TICHAUER ET CIE,

Petitioners,

VS.

BELL EQUIPMENT CORPORATION, a corporation, JAMES A. GORSO, JACK CHICONELLA, CLYDE A. TEVIS, HARRY J. PHILLIPS, RICHARD E. McKENNA, AMEDIO VITALE, and THE MARLEY COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1974

No. 696

SOCIETE de CONSTRUCTION MECANIQUES du BUGEY and TICHAUER et CIE,

Petitioners,

vs.

BELL EQUIPMENT CORPORATION, a corporation, JAMES A. GORSO, JACK CHICONELLA, CLYDE A. TEVIS, HARRY J. PHILLIPS, RICHARD E. McKENNA, AMEDIO VITALE, and THE MARLEY COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Questions Presented

The questions presented are satisfactory to the respondent, except that question IV on page 3 of the Brief should read that the complaints were subsequently refiled on May 21, 1973 and service made under the long arm statute, which statute was effective February 15, 1973.

Statement of the Case

The statement of the case is acceptable to the respondent with the exception that the petitioners made six shipments of spare parts into Pennsylvania during the period of six months immediately prior to the collapse of the crane.

Argument

1. In response to petitioner's first reason, such long arm statutes involving products liability cases or the so called stream of commerce cases are commonly and widely used. In addition, the perimeters of the exercise of such jurisdiction has already been set out by this Court in *International Shoe Company vs. State of Washington*, 326 U.S. 310 (1945); *McGee vs. International Life Ins. Co.*, 355 U.S. 220, (1957), and *Hanson vs. Denckla*, 357 U.S. 235 (1958).

2. Petitioners argue in reason two, that they lack substantial contact with the Commonwealth of Pennsylvania because the crane in question was merely brought into Pennsylvania subsequent to the purchase of it by Marley Company. Petitioners reluctantly admit the direct shipment of spare parts into Pennsylvania by petitioners. It is submitted that since the petitioners made the respondent, Bell Equipment Corporation, their exclusive sales agent in the United States, that they knew or should have known that said crane would come into Pennsylvania. The allegation that said crane was defectively designed and manufactured satisfied the stream of commerce theory that they were doing business, because under the statute in question, such action amounted to an indirect shipment into Pennsylvania.

In addition thereto, six separate shipments of parts by petitioners to Marley Company in Pennsylvania, shows their knowledge that it had been brought into Pennsylvania as well as showing direct shipments into Pennsylvania, which constitutes doing business in Pennsylvania and which was a benefit to them.

When these actions are coupled with the alleged tortious injury caused to Pennsylvania citizens and property located in Pennsylvania, substantial contact with the Commonwealth of

Pennsylvania has been shown. This has been the rationale of the majority of the Courts which have considered this matter. *Florio vs. Powder Power Tool Corp.*, 248 F2d 367, (3rd Cir. 1957); *Eyerly Aircraft Co. vs. Killian*, 414 F2d 591, (5th Cir. 1969); *Etzler vs. Dille and McGuire Mfg. Co.*, 249 F. Supp. 1, (W.D. Va. 1965); *Keckler vs. Brookwood Country Club*, 248 F. Supp. 645, (N.D. Ill. 1965); *Harford vs. Smith*, 257 F. Supp. 578, (N.D. W. Va. 1966); *Jackson vs. National Linen Service Corp.*, 248 F. Supp. 962 (W.D. Va. 1965); *Benn vs. Linden Crane Co.*, 326 F. Supp. 995, (E.D. Pa. 1971); *Aquarium Pharm. Inc. vs. Industrial Press & Pack, Inc.*, 358 F. Supp. 441, (E.D. Pa. 1973); *Anderson vs. Penncraft Tool Co.*, 200 F. Supp. 145 (N.D. Ill. 1961); *Gray vs. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d, 761 (1961).

3. The third, fourth and fifth reasons for granting certiorari are without merit and will be treated together in this paragraph. The law set out in *International Shoe Co., supra,* sets forth general guidelines, which are valid today. No one specific rule can be laid down in these product liability cases but of necessity must be decided on the facts of each case. Since the *International Shoe Co.* decision, this Court has set forth clarifying principles in *McGee vs. International Life Co., supra.* In that case, the Court upheld jurisdiction upon a single 'contact' involving an insurance contract. The Court has not passed upon a single transaction situation involving a tort or contract other than insurance, but there seems to be little doubt that it would find either, as a matter of due process, constituted a sufficient contact to subject a non-resident to the jurisdiction of a state Court. In reviewing this Court's decision in *McGee, supra.* the Court cited with approval, in footnote two, the case of *Smyth vs. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664, 25 A.L.R.2d 1193, in which the Vermont Supreme Court held that a Vermont statute per-

mitting personal jurisdiction over a non-resident defendant who committed a tort in Vermont, did not violate due process. More recently, in *Rosenblatt vs. American Cyanamid Co.*, 382 U.S. 110, (1965), this Court indicated that it would go along with the trend to extend jurisdiction. In that case, jurisdiction was obtained in Italy over defendant under a New York statute authorizing *in personam* jurisdiction over absent non-residents on the basis of tortious conduct in the forum.

Petitioners cite *Benjamin vs. West Load Building Corp.*, 472 F2d 725 (5th Cir. 1973) in their argument for a more specific guideline. Said case was denied certiorari at 414 U.S. 830 (1974).

The rationale for extending jurisdiction to this fact situation is not based solely on the reason that a product is simply brought into a forum as argued by petitioners on page 9 of their Brief. Rather, it is based on the presence of the product in the forum through the stream of commerce and is the cause of substantial injury to person or property within the forum state.

In this instance, the collapse of the crane caused six serious personal injury claims involving the loss of limb, fractures to various limbs and vertebrae, among others. In addition, a property damage claim in excess of Five Hundred Thousand ($500,000.00) Dollars is being asserted.

Certainly, the Commonwealth of Pennsylvania has a significant interest in protecting its citizens and their property from the results of these crippling injuries and damages caused by tortious conduct. Certainly, these contacts meet the "nature and quality" test laid down by this Court in *International Shoe and McGee, supra.*

In addition to the stream of commerce theory, these petitioners shipped merchandise directly into the Com-

monwealth of Pennsylvania on six occasions and indirectly shipped a defective crane into Pennsylvania. Both types of shipments designate them as doing business in Pennsylvania by virtue of the statute in question. As such, the laws of Pennsylvania apply to them.

As to the argument that this Court should review this statute, it is submitted that the Third Circuit Court of Appeals refused to exercise its discretion to review these cases at this point. No abuse of discretion has been alleged or shown by Petitioners. At best, a review by this Court would be premature.

4. The sixth reason, as well as all the others, was fully considered and ably discussed by the Trial Court in its Opinion. Appendix A, page 38. The trial forum is the most convenient place to try these cases. This is where the injuries took place, where the majority of witnesses reside. It does not offend "traditional notions of fair play and substantial justice" to conclude that if the law of Pennsylvania requires sellers to defend in Pennsylvania, why should not the distributors and manufacturers likewise defend their products under Pennsylvania law where the tortious acts occurred? In addition, if traders in interstate commerce are required to so defend under similar circumstances, no valid distinction can be drawn when such traders are international in scope.

Conclusion

It is respectfully submitted that the procedural rights giving Pennsylvania Courts jurisdiction are determined as of May 21, 1973 and that the law then in effect provides a basis for finding the petitioners "doing business" in Pennsylvania and that such finding, coupled with the impact of the collapse of the crane manufactured and sold by the petitioners, causing

injury to property and persons inside Pennsylvania, gives Pennsylvania Courts a basis for asserting jurisdiction which is consistent with the Due Process requirements of the United States Constitution and the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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